

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

VALMET, INC.)	
)	
and)	CASE NO. 15-CA-206655
)	CASE NO. 15-RC-204708
UNITED STEEL PAPER AND FORESTRY,)	
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED-INDUSTRIAL AND SERVICE)	
WORKERS INTERNATIONAL UNION,)	
AFL-CIO, CLC)	
_____)	

**RESPONDENT VALMET, INC.'S ANSWERING BRIEF TO CHARGING PARTY'S
CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Respondent Valmet, Inc. (“Valmet”), pursuant to the Board’s Rules and Regulations § 102.46(d)(1) submits this Answering Brief to Charging Party’s (“CP”) Cross-Exceptions to the Decision of the Administrative Law Judge (“ALJD”) in the above-captioned case.

CP Cross-Exception 1: To the finding of the ALJ that Valmet, by Douglas Sheaffer did not violate the Act, by suggesting that employees would not benefit from Union representation.

CP Cross-Exception 2: To the finding of the ALJ that Valmet, by Douglas Sheaffer’s “remarks did not rise to the level of a statutory violation.

Answer 1 and 2: The ALJD properly found that Sheaffer did not unlawfully suggest that employees would not benefit from Union representation.

The ALJD correctly concluded that Sheaffer’s remarks in the recorded September 13 meeting were not unlawful threats of futility. (ALJD, p. 13 at 4-9.) In support of its cross-exceptions, CP focuses on a few isolated comments by Sheaffer during the September 13 meeting to argue that he unlawfully “created the impression for employees that voting for the Union would not lead to any improvements in their wages or working conditions through collective bargaining and that if anything, they would end up worse off.” (CP Cross-Exceptions, p. 3.) Specifically, CP points to the following alleged comments by Sheaffer as evidence that he unlawfully threatened futility in bargaining:

- “The first thing you jump to and you say is would they be able to improve the wages and benefits. I think that is highly unlikely.” [GC Ex. 3B between 11:15 and 11:45]
- He then went on to tell employees that their wages are essentially the same as at the unionized Valmet facilities and that their benefits are better because the union facilities don’t get any 401(k) match. [GC Ex. 3B between 12:50 and 14:20]
- “[B]asically, the process we go through when we negotiate contracts, we have a little legend, a little matrix and we have all of the plants, we know all the plants and we have the wage rates, we have the increases and essentially you try to keep everybody the same. If somebody is telling you that there is a big expectation out there if you get a union you’re going to get a 10% increase to your pay or benefits, yes everything is subject to negotiation and I can’t make any promises, but I can tell you today the facts are I just do not see how that can happen.” [GC Ex. 3B between 15:00 and 16:00]

- “Everybody is essentially the same now that they have been for the past 17 years in business, and in fact, some of the locations that aren’t union actually have better benefits and pay increases than some of the union facilities have had. You also have to think about the liability of the business, can the business afford any huge increases. I just want to put those facts out there so that you realize it is probably not feasible to get any of those things.” [GC Ex. 3B between 17:30 and 18:45]
- “If you are worried about communication or how the front office works or how much subcontracting goes on, having a union contract does not affect any of those things.” [GC Ex. 3B between 31:20 and 32:50]

(CP Cross-Exceptions, pp. 2-3.)

These selectively highlighted statements do not violate the Act for the following reasons:

(1) they do not constitute threats that the Board considers unlawful; (2) the comments must be considered in the broader context of Sheaffer’s September 13 speech; and (3) CP’s sparse citation to Board authority does not support a finding that Sheaffer’s comments were unlawful – to the contrary, well-established Board law supports the ALJD’s finding that Sheaffer’s comments did not violate the Act.

A. Sheaffer’s comments were facially lawful.

Section 8(c) of the Act specifically permits an employer to truthfully advise employees about the collective-bargaining process, about the benefits they currently receive, and about the fact that such matters become subject to negotiation in the event that the Union is certified. Sheaffer’s comments were made in the context of discussing exactly these facts, including the fact that negotiations can result in better conditions, worse conditions, or the same conditions or any other variable that bargaining may reach, all of which are expressly permitted pursuant to Section 8(c).

Additionally, accurate statements of the law that voting for a union does not automatically guarantee an increase in wages and benefits do not threaten futility, since the employer does not have to agree to any union bargaining demand, and the employer has as much right to ask for wage

and benefit reductions as the union has to ask for increases. *See Gen. Elec. Co.*, 332 NLRB 919 (2000); *Fern Terrace Lodge of Bowling Green*, 297 NLRB 8 (1989). “[A]n employer is free to communicate to his employees any of his general views about unionism or any of his views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’” *Gen. Elec. Co.*, 332 NLRB at 919. In *Fern Terrace Lodge*, the Board held that the following statement was a lawful and accurate statement of the law, not an implication that the employees’ selection of the union would be futile:

You should know that voting the union in does not automatically guarantee any increase in wages or other benefits, because under the law a company does not have to agree to any demand or proposal that a union might make. Even if it got in here, a union couldn’t force us to agree to anything that we could not see our way clear to putting into effect from a business standpoint.

....

[W]e have just as much right under the law to ask that wages and other employee benefits be reduced as the union would have to ask that they be increased.

297 NLRB at 8. In the same vein, and as the ALJD correctly found, Sheaffer’s statements regarding the uncertainty of negotiations and potential wage increases were accurate statements of the realities of the bargaining process, not unlawful threats of futility. *See also Milford Plains Ltd. P’ship*, 309 NLRB 942 (1992) (no threat of futility where supervisor told employee that “we don’t want the Union in here because we don’t have no money . . . trying to get money from us is trying to get water from a stone,” and that, though the Union might promise sick days and other benefits, employees could not get them “if we don’t have any money because we have a lot of creditors”); *Wild Oats Markets, Inc.*, 344 NLRB 717 (2005) (employer statement to employees that “in collective bargaining you could lose what you have now” not a threat of futility, but rather accurate descriptions of the bargaining process).

Even in the context of coercive statements about the futility of bargaining, which are not present here, statements that employees lose direct access to management upon becoming unionized are usually considered lawful as realistic statements of the relationship between employees and companies following certification of a bargaining representative. *See Hyatt Hotels Corp.*, 296 NLRB 259, 259 n.3 (1989) (“[S]tatements . . . concerning loss of access to management in the event of unionization do not constitute threats, but simply explicate one of the changes which occur between employers and employees when a statutory representative is selected) (punctuation and citations omitted); *Pepsi-Cola Co.*, 307 NLRB 1378 (1992). Like in *Hyatt Hotels*, Sheaffer’s comments here merely point out the possible realities post-certification. Recognizing that Board precedent does not require GC or CP to present evidence that employees actually felt threatened, it is nonetheless telling that GC or CP never put on any evidence relating to those allegations other than the recordings themselves. Nonetheless, the ALJD properly found these comments, in the context described below, did not violate the Act.

The ALJD likewise properly found that Sheaffer’s description of his own experience of long negotiations on a first contract did not violate the Act. In *General Electric*, on remand from the D.C. Circuit, the Board held that the following language in the employer’s handbill was a lawful explanation of the potential consequences of selecting union representation:

Are you willing to see this Site possibly become another victim in *long, bitter negotiations*?

Are you willing to face the possibility of a *long and ugly strike*.

VOTE NO!

332 NLRB 919 (2000) (emphasis in original). There, the Board found that the employer “was not telling its employees that union representation would be futile. Rather, the [employer’s] explanation was consistent with how the Act operates in practice. If parties are sharply divided . . . ,

negotiations can indeed become protracted and bitter.” *Id.* See also *Milum Textile Servs. Co.*, 357 NLRB 2047, 2054 (2011) (no threat of futility where employer warned employees that “the process of getting a union could be a long one; there could be a lot of problems because employees could strike, and they might have to go to court to obtain a union election”).

As in the above-cited Board authority, Sheaffer did not tell employees that unionization would be futile. Indeed, Sheaffer did not go as far as to suggest the duration or conditions of negotiations and possible strike. Surely, if the Board held that the language in *General Electric* was lawful, Sheaffer’s statements are also lawful. Throughout the September 13 meeting, Sheaffer simply tried to explain how the negotiation process works and possible risks associated with collective bargaining – facially lawful subjects for an employer to discuss with employees.

B. Sheaffer’s comments were lawful in light of the broader context of his speech.

Sheaffer did not make any express or implied suggestion that Valmet would not bargain in good faith with the Union. In fact, Sheaffer went out of his way to explicitly ensure that the employees understood Valmet would bargain in “good faith” with the Union if the employees voted in favor of Union representation. (GC Ex. 3B. at 36:00.) These statements took place during the exact same meeting in which Sheaffer made the allegedly threatening statements. Accordingly, even if Sheaffer’s comments could be considered threatening (they were not), Sheaffer’s clarifying statements that Valmet would bargain in good faith corrected any implication that bargaining would be futile. See, e.g., *Gen. Elec. Co.*, 332 NLRB at 920 (holding on remand that employer’s predictions of possible “long, bitter negotiations” and a “long and ugly strike” could not be converted into statements of certainty to support a finding “that such negotiations are in bad faith” and thus futile); *Reg’l Home Care, Inc.*, 329 NLRB 85, 93 (1999) (adopting ALJ’s finding that

employer unlawfully threatened futility, but only where “[n]o suggestion was made that the lack of improvements would be due to hard but good-faith bargaining”).

C. CP’s sparse citation to contrary Board authority is misplaced.

CP cites only two cases in its challenge to the ALJD’s proper rejection of its claim that Sheaffer’s remarks threatened futility. Neither provide support for CP’s untenable position. In *Am. Telecommc’ns Corp.*, 249 NLRB 1135, 1136 (1980), the Board found that the employer unlawfully threatened employees with futility by stating that employees “would receive all the benefits of a union contract without a union,” and that “with a union you just pay dues and get nothing for it.” In contrast with Sheaffer’s statements – which uniformly expressed uncertainty as to the outcome of negotiations – the employer’s threats of futility in *American Telecommunications* were unequivocal. Moreover, as opposed to Sheaffer, who explicitly stated that Valmet would bargain in “good faith” if employees selected Union representation, the Board found no such clarifying remarks in *American Telecommunications*. *Id.*

CP’s reliance on *General Industries* is similarly unsuitable. There, too, the employer repeatedly made a number of unequivocal threats of futility:

- “[A] union has to negotiate with management from scratch to establish ALL working conditions for the employees it represents ... the only way that the union can try to force the company to agree is to make you go out on strike ... after the strike is over you may no longer have a job.
- On final pre-election posters, declaring “Violence, One Promise the Union Will Keep”

Gen. Indus. Elecs. Co., 146 NLRB 1139, 1140 (1964). These unequivocal statements, made in pre-meditated written materials and posters presented to employees, are a far cry from the innocuous contemporaneous statements made by Sheaffer in his September 13 remarks. Sheaffer did not use the term “from scratch” or start “from zero,” two terms traditionally admonished as

implied threats that employees would lose current pay and benefits. He did not threaten loss of employment. He did not threaten violence. The Board should therefore adopt the ALJD's finding that Sheaffer did not threaten futility if employees selected Union representation.

CP Cross-Exception 3: To the failure of the ALJ to determine that Valmet's raffle prize was an unlawful promise of benefit.

Answer 3: The ALJ properly determined that Valmet's pre-election quiz contest was not an unlawful promise or grant of benefits.

A. Valmet's Quiz Contest

The essential facts regarding Valmet's quiz contest are not in dispute. In fact, the parties agreed to a Joint Stipulation of Facts (GC Ex. 1, Jt. Exs. 1-4) on the contest details. As stated in the initial contest announcement, Valmet was concerned that pro-union supporters would try to prevent its employees from reviewing Fact Sheets on issues relevant to election choices. (GC Ex. 2; J. Exs. 1-4.) To encourage voters to educate themselves on relevant facts before the election, Valmet announced the contest terms on August 30. That contest announcement was posted for all employees to see. (J. Ex. 1.)

On September 10, another posting reminded employees of the upcoming contest. In that, they were informed that quiz forms would be available at 5:30 a.m. on September 12. Starting at 5:30 a.m. on September 12, employees on each shift were told they could pick up a quiz form in their supervisors' office. (J. Ex. 2.) Quiz forms were distributed among supervisors and the forms, themselves, clearly state that taking a quiz to complete was a "completely voluntary" and "completely anonymous" act. (J. Ex. 3.) Any employee who took a quiz form was expressly instructed that his name was not to appear on his answered quiz form and it had to be deposited in

a designated box by no later than noon on September 13, more than 24 hours before the election was scheduled to begin. (ALJD, p. 4 at 35-37; J. Ex. 2, 3.)¹

Shortly after noon on the day before the election, the box of quiz forms was collected and the quizzes were graded after the September 15 polling period ended. (ALJD, p. 4 at 36-38.) Winning tickets were randomly selected from the multiple contest entries with the most correct answers. (ALJD, p. 4 at 39-40.) The anonymous winners were announced, by quiz form number only, on September 18 (the following Monday), three days after the representation election ballots were counted. (GC Ex. 2, ¶ 9; ALJD, p. 4 at 37-40.) On October 6 – weeks after the September 15 polling period ended – Valmet awarded via direct deposit \$900 to employee Daniel Carter and \$450 to employee Charlie Horton as winners of the contest. (ALJD, p. 4 at 40-42.)

B. The quiz contest was not an unlawful promise of benefit under well-established Board law.

Valmet’s quiz contest was conducted in compliance with long-standing precedent governing the use of such contests in the context of an organizing campaign. In *Atlantic Limousine, Inc.*, 331 NLRB 1025 (2000), the Board set forth the standard under which pre-election prizes might be deemed to violate the Act: “[I]f (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day or (2) the raffle [or contest] is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls.” *Id.*

¹ CP falsely asserts in its cross-exceptions – unsurprisingly without reference to the record evidence – that quizzes “were to be turned in 3 days before the election.” (CP Cross-Exceptions, p. 5.) This is a disingenuous and flatly false attempt to suggest to the Board that Valmet had time to review quiz responses and tailor its message to employees prior to the election. This is not the case as the quiz contest deadline was the day before the election and less 2 hours before the 24 hour period. No additional messaging took place after the quiz forms were collected.

Here, Respondent went to great lengths to ensure that participation in the quiz contest was not conditioned on voting in the election or related to a participant's presence at the election site. Indeed, participation could not have been so conditioned because the Company required that voluntary participants submit their quizzes more than twenty-four (24) hours prior to the scheduled election. (ALJD, p. 4 at 35-37.) There was no connection whatsoever between eligibility for the two prizes offered – gained by submitting answers to the quiz prior to the election – and actually voting in or being present for the election. (GC Ex. 2; Jt. Exs. 1-4.)

Likewise, the Company did not take any actions concerning the quiz contest between 2:00 p.m. on September 13 (24 hours prior to the scheduled opening of the polls) and 7:00 a.m. on September 15 (the closing of the polls). (GC Ex. 2, ¶¶ 6(e), 8, 9; ALJD, p. 4 at 35-37.) The contest was announced two (2) weeks prior to the election, on August 30. (GC Ex. 2, ¶ 2, Jt. Ex. 1; ALJD, p. 3 at 16.) The quiz was available for pick-up and submission only from September 12 at 5:30am until noon on September 13. (Jt. Ex. 3; ALJD, p. 3 at 40-42, p. 4 at 35-36.) Contest winners were not identified until after the election closed on September 15, and the prizes were not awarded until the regularly scheduled payday after the election. (GC Ex. 2, 5; Tr. 71; ALJD, p. 4 at 35-42.) This contest was therefore entirely permissible under the Board's bright line test in *Atlantic Limousine*. (ALJD, p. 11 at 7-8.)

C. The post-election payments to winners of the quiz contest were not grants of unlawful benefits.

CP objects to the ALJD's decision not under the Board's *Atlantic Limousine* test, but on the grounds that the prizes constituted a benefit designed to unlawfully impact the outcome of the election under the standard set forth in *B&D Plastics, Inc.*, 302 NLRB 245, 245 (1991). (GC Exs. 1(m), (o); Complaint, ¶ 7.) (CP's Cross-Exceptions, p 4.) The Company's quiz contest did not,

however, implicate these concerns because it did not unlawfully influence the outcome of the election.

Contrary to the many factual inaccuracies set forth in its cross-exceptions, CP accurately states the relevant factors for analyzing whether the quiz prizes constituted an unlawful benefit: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. *B&D Plastics, Inc.*, 302 NLRB at 245. Here, Valmet offered only 2 cash prizes to be awarded to 2 employees, both based on the average dues that employees would have paid if the Union won the election and negotiated a contract; \$900 represented a full year of dues, and the second prize of \$450 represented a half year of Union dues. (GC Ex. 2, ¶¶ 3, 4; Jt. Ex.1.)

The \$1,350 in total prize money is well within the value of prizes that the Board has found permissible in the context of a quiz contest since *Atlantic Limousine*. For instance, the Board in *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1273 (2004) approved of the employer's raffle, in which it gave away goods valued at more than \$2,250.00.² There, the Board held that the permissible prizes were designed to "focus the employees' attention on the issues which a representation election participant usually debates." *Id.* at 1273. The same approach is permissible here. With prizes of considerably lower value, the Company used its contest to "make sure employees were aware of the facts which [it] sought to emphasize during the campaign." *Thrift Drug Co.*, 217 NLRB 1094, 1095 (1975). *See also Raleigh Cty. Comm'n on Aging, Inc.*, 331 NLRB 925 (2000) (holding that employer's pre-election promise to employees of a fully catered

² The election in *Washington Fruit* was held in January 1998. The value of these goods as of September 2017 was \$3,436.53, according to the U.S. Bureau of Labor Statistics CPI Inflation Calculator. *See* https://www.bls.gov/data/inflation_calculator.htm.

victory dinner if employees did not select union representation was not objectionable under *B&D Plastics*, where the dinner cost employer about \$15 per person and 73 employees voted in the election – for a total potential cost of \$1,113.25, or the equivalent of \$1,632.63 in September 2017 accounting for inflation).

In addition, unlike in *B&D Plastics* and other cases applying the standard for impermissible grant of benefits, Valmet did not award the winning prizes until after employees voted. (GC Ex. 1, ¶¶ 9, 11; Jt. Ex. 4; ALJD, p. 4 at 40-42.) The 2 employees did not receive any benefit until October 6, 2017, 3 weeks after they voted. (GC Ex. 1, ¶ 10; ALJD, p. 4 at 41-42.) In *B&D Plastics*, the benefits awarded certainly were not part of a lawful quiz contest; instead, the employer gave all employees two full paid days off and held a cook-out for them before voting took place. 302 NLRB at 245. The benefits found to violate the Act under the *B&D Plastics* standard do not involve contests, but rather gratuitous benefits that can have a long-lasting impact on employee's terms and conditions of employment. *See e.g., Bozzutos, Inc.*, 365 NLRB No. 146 (Dec. 12, 2017) (granting of unscheduled pay increase on same day employer learned of organizing activity).

Furthermore, cases cited by CP in which the Board has found cash prizes “of lesser amounts” unlawful are distinguishable. CP conveniently omitted the clear distinguishing factors present in those cases but not applicable to the facts of this case. The employer in *BFI Waste Systems* announced raffle winners and distributed new television sets to 5 different employees up to 2 days before the election. *BFI Waste Sys.*, 334 NLRB 934 (2001). The Board specifically relied on the fact that the employer granted these benefits in the days leading up to the election in holding that the prizes were unlawful. “Given the proximity of the Employer’s conferral of benefit to the election, the inference that benefits granted during the critical period are coercive is

especially strong under the facts here.” *Id.*³ Similarly, the employer in *Recycling Indus., Inc.*, 20-CA-29897-1, 2001 WL 1635471 (NLRB Div. of Judges, Nov. 20, 2001) held a raffle and distributed cash prizes to three employees out of 18 eligible bargaining unit employees. The ALJ found particularly “telling” the employer’s decision to award the cash prizes “slightly more than 24 hours before the election.” *Id.* In contrast, Valmet did not grant any coercive benefits because it waited until well after the election to announce winners and deposit the prize money.

For these reasons, the Board should adopt the ALJD’s finding that Valmet’s quiz contest did not constitute an unlawful promise or grant of benefits. (ALJD, p. 11 at 7-8.)

Respectfully submitted this 10th day of July, 2018,

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³ Though the total value of the five television sets was approximately \$890.00 (\$1,274.18 in September 2017, accounting for inflation), the employer also held a cookout prior to the election in conjunction with the raffle. Neither the Board nor the ALJ in *BFI Waste Systems* addressed the value of the cookout or the items such as t-shirts distributed by the employer at the cookout. *BFI Waste Sys.*, 334 NLRB 934 (2001).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that *Respondent Valmet, Inc.’s Answering Brief to Charging Party’s Cross-Exceptions to Decision of the Administrative Law Judge* in the above case has been served on the following by electronic mail:

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Dated this 10th day of July, 2018.